

Nos. 87-712 and 87-929
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH
AND HUMAN SERVICES, et al.,

Petitioners,

v.

COMMONWEALTH OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS,

Cross Petitioner,

v.

OTIS R. BOWEN, SECRETARY OF HEALTH
AND HUMAN SERVICES, et al.

On Writs of Certiorari to The United States
Court of Appeals For the First Circuit

BRIEF OF AMICI CURIAE VICTORIA GRIMESY,
LISA M. MAYO, ERIKA SMITH, LUCY RICO,
MICHELLE BOLES, GINA MOSQUEDA, CENTER ON
LAW AND SOCIAL POLICY, MICHIGAN LEGAL
SERVICES, NATIONAL HEALTH LAW PROGRAM,
NATIONAL HOUSING LAW PROJECT, NATIONAL
LEGAL AID AND DEFENDER ASSOCIATION,
NATIONAL SENIOR CITIZENS LAW CENTER, SOLANO
COUNTY LEGAL ASSISTANCE, IN SUPPORT OF THE
COMMONWEALTH OF MASSACHUSETTS

RICHARD ROTHSCHILD
Attorney of Record
MARK GREENBERG
Western Center on Law and
Poverty, Inc.
3535 West Sixth St.
Los Angeles, California 90020
(213) 487-7211

(Counsel for Amici continued on next page)

Counsel for Amici (continued)

TAMARA DAHN
Solano County Legal Assistance
930 Marin St.
Vallejo, California 94590
(707) 643-0054

GILL DEFORD
National Senior Citizens Law
Center
1052 W. Sixth St., #700
Los Angeles, California 90017
(213) 482-3550

CHARLES GREENFIELD
Legal Aid Society of Santa
Clara County
210 S. First St.
San Jose, California 95113
(408) 998-5200

JANE PERKINS
RODGER SCHWARTZ
National Health Law Program
2639 S. La Cienega Bl.
Los Angeles, California 90034
(213) 204-6010

PETER REID
Legal Aid Society of San Mateo
County
298 Fuller St.
Redwood City, California 94063
(415) 365-8411

MANUEL ROMERO
National Housing Law Project
1950 Addison St., 2nd Floor
Berkeley, California 94704
(415) 548-9400

TABLE OF CONTENTS

INTEREST OF THE AMICI.....	1
SUMMARY OF ARGUMENT.....	4
I. The Tucker Act does not divest a....	8
District Court from exercising jurisdiction over a state's third party complaint seeking federal financial participation for costs arising in an underlying action between beneficiaries and the state.	
A. Course of Events in.....	11
<u>Grimesy v. McMahon v. Bowen</u>	
B. A third party complaint.....	17
seeking to enjoin denial of federal financial participation for costs not yet incurred does not meet the elements of a Tucker Act claim.	
C. A finding that the Tucker.....	23
Act divests a district court of jurisdiction in Social Security Act third party complaint litigation would cause severe problems of judicial and program administration.	
i. HHS' Position would.....	25
result in multiple forums and duplicative litigation.	

ii. HHS' Position would.....31	
have the effect of	
creating a national	
trial court and a	
National Court of	
Appeals for Social	
Security Act litiga-	
tion.	
III. An expansive construction of the....36	
Tucker Act raises troublesome	
implications in other areas of	
law affecting federal program	
beneficiaries.	
A. Federal Housing Programs.....36	
B. Other Federal Programs.....45	
CONCLUSION.....48	

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
Amoco Prod. Co. v. Hodel,..... 815 F.2d 352 (5th Cir. 1987), <u>cert. petition pending</u>	44
Committee for Fairness, et al.,..... v. Pierce, C.A. No. 87-0324 JHP (D.D.C.)	36
Commonwealth of Massachusetts v..... Departmental Grant Appeals Board, 815 F.2d 778 (1st Cir. 1987)	33
Conille v. Pierce,..... 649 F. Supp. 1133 (D. Mass. 1986), <u>aff'd</u> , No. 87-1120 (1st Cir., Feb. 19, 1988)	36
Council of Large Public Housing..... Authorities v. HUD, C.A. No. 82-1210 NHJ (D.D.C.)	37
Edelman v. Jordan,..... 415 U.S. 651 (1974)	31
Frisby v. HUD,..... 755 F.2d 1052 (3d Cir. 1982)	39
Grimesy v. McMahon v. Bowen,..... Federal Circuit Court of Appeals Case No. 87-1228; Ninth Circuit Court of Appeals Case No. 87- 1745	passim
Jiminez v. Cohen,..... No. 85-5285 (E.D. Pa. July 14, 1986)	12
Johnson v. Secretary of HUD,..... 710 F.2d 1130 (5th Cir. 1983)	44

Kali v. Heckler,.....	12
800 F.2d 971 (9th Cir. 1986)	
Laguna Hermosa Corp. v. Martin,.....	21
643 F.2d 1376 (9th Cir. 1981)	
Mann v. Pierce,.....	36
803 F.2d 1552 (11th Cir. 1986)	
Maryland Dept. of Human Resources v.....	33
Dept. of Health and Human Services,	
763 F.2d 1441 (D.C. Cir. 1985)	
McCarthy v. Heintz,.....	12
Civ. No. H-85-597 (MJB)	
(D.Conn. Apr. 23, 1986)	
Merrill Tenant Council v. HUD,.....	44
638 F.2d 1086 (7th Cir. 1981)	
Morrison v. Heckler,.....	12
602 F.Supp. 1482 (D.Minn. 1984),	
<u>aff'd</u> , 787 F.2d 1285 (8th Cir.	
1986)	
New Mexico v. Regan,.....	44
745 F.2d 1318 (10th Cir. 1984),	
<u>cert. denied</u> , 471 U.S. 1065	
(1985)	
Paris v. HUD,.....	39
713 F.2d 1341 (7th Cir. 1983),	
<u>subsequent decision sub nom</u>	
<u>Cowherd v. HUD</u> , 827 F.2d 40	
(7th Cir. 1987)	
Portsmouth Redevelopment & Housing.....	44
Authority v. Pierce,	
706 F.2d 471 (4th Cir.), <u>cert.</u>	
<u>denied</u> , 464 U.S. 960 (1983)	
Rowe v. United States,.....	21
633 F.2d 799 (9th Cir. 1980),	
<u>cert. denied</u> , 451 U.S. 970 (1981)	

Russell v. Landrieu,.....	39
621 F.2d 1037 (9th. Cir. 1980)	
State of Minnesota by Noot v. Heckler,..	33
718 F.2d 852 (8th Cir. 1983)	
Tenants for Justice v. Hill,.....	39
413 F.Supp. 389 (E.D. Pa. 1975)	
Thomas v. Pierce,.....	supra
662 F. Supp. 519 (D. Kan. 1987),	
<u>appeal pending</u> , Case No. 87-2121	
(10th Cir.)	
Topps v. Bowen,.....	12
No. 85-NC-0187W (N.D. Utah, Jan.	
13, 1986)	
Trans-Bay Engineers and Builders,.....	44
Inc. v. Hills,	
551 F.2d 370 (D.C. Cir. 1976).	
United States v. King,.....	6, 20
395 U.S. 1, 3 (1968)	
United States v. Mitchell,.....	5, 17
463 U.S. 206 (1983)	
United States v. Mottaz,.....	6, 19
476 U.S. 834, 106 S.Ct. 2224	
(1986)	
United States v. Testan,.....	18
424 U.S. 392 (1976)	
Uram v. United States,.....	29
216 Ct.Cl. 418 (1978)	

Statutes

Housing and Community Development.....	39
Amendments of 1978,	
12 U.S.C. §1701z-11	
Tax Reform Act of 1986, P.L. 99-514.....	14

5 U.S.C. §702.....	40
5 U.S.C. §706.....	40
12 U.S.C. §1702.....	40, 44
28 U.S.C. §1295(a)(2).....	16
28 U.S.C. §1295(a)(3).....	24
28 U.S.C. §1491.....	41
42 U.S.C. §601 <u>et seq.</u>	11
42 U.S.C. §602(a)(39).....	12, 14
42 U.S.C. §1404.....	40, 44
42 U.S.C. §1404a.....	40

Regulations

24 C.F.R. §290.25(b) (1978).....	39
24 C.F.R. §290.27(b) (1978).....	39

INTEREST OF THE AMICI

In the pending case, the Court is being asked to decide whether the Tucker Act prevents a district court from exercising jurisdiction over a state's action challenging a disallowance of funds in the Medicaid Program. The resolution of this issue will have profound importance for other Social Security Act litigation, and may affect access to the district courts and regional courts of appeals in many other areas of law.

Disallowance litigation is only one type of litigation affecting administration of the grant-in-aid programs under the Social Security Act. The other major type of litigation occurs when program beneficiaries sue a state for alleged violations of the Act. In such instances, the state often files a third party complaint against the federal government, alleging that if the state is liable to program beneficiaries, the federal government should be

obligated to provide federal financial participation in the state's costs. The disposition of Bowen v. Massachusetts may have a critical effect on such third party complaint litigation.

Amici include the plaintiffs in Grimesy v. McMahon v. Bowen, currently pending before the Federal Circuit Court of Appeals (Case No. 87-1228) and before the Ninth Circuit Court of Appeals (Case No. 87-1745). As more fully set forth below, the Grimesy litigation offers an example of the implications of HHS' Tucker Act jurisdictional arguments when applied to third party complaint litigation. HHS has argued in Grimesy that when a class of welfare recipients sues state officials for prospective relief and back benefits, and the state files a third party complaint against HHS, the third party complaint arises in part under the Tucker Act and may only be heard in the United States Claims Court. Relief for plaintiffs in Grimesy has been

stayed pending resolution of this jurisdictional issue.

Amici believe that the Grimesy litigation helps illustrate some of the problems that would result if HHS' Tucker Act jurisdictional argument were accepted in this case. Applying HHS' jurisdictional argument to third party complaint litigation would lead to duplicative litigation in multiple forums, and could cause chaotic dispositions of issues arising under the Social Security Act.

In addition to the Grimesy plaintiffs, amici include legal services organizations and public interest law offices who represent indigent clients in issues concerning federal grant-in-aid programs, federal housing programs, and other federally funded programs for the poor.

Amici have an interest in this case because the result may affect Social Security Act litigation whenever beneficiaries sue a state and the state initiates a

third party complaint against HHS. Amici believe the position being urged by HHS would result in countless procedural problems for Social Security Act and related litigation.

Amici also fear that the expansive view of the Tucker Act urged by HHS could adversely affect access to the federal courts in other areas affecting the poor. HHS' Tucker Act argument, if accepted, would shift much of the nation's litigation on the rights of beneficiaries and states in federal grant-in-aid programs to the United States Claims Court and the Federal Circuit Court of Appeals. This would create a morass of procedural and substantive problems. Amici wish to suggest some of the most troublesome ramifications of the position espoused by HHS.

SUMMARY OF ARGUMENT

The broad construction of the Tucker Act being urged by the United States raises serious problems in contexts other than

Medicaid disallowances.

The implications of the broad construction are illustrated by Social Security third party complaint litigation. This is litigation where beneficiaries sue a state for violation of the Social Security Act, and the state files a third party complaint against HHS. The third party complaint typically seeks to insure federal financial participation in the costs of any orders issued by the court in the underlying litigation.

In Grimesy v. McMahon, now pending before the Federal and Ninth Circuits, HHS contends that a state's third party complaint in such a case arises in part under the Tucker Act. This contention is inconsistent with established Tucker Act precedent. A Tucker Act claim based on a federal statute must seek a money judgment based on a statute that mandates compensation for damages sustained. United States v. Mitchell, 463 U.S. 206, 216-17

(1983). A state's third party complaint alleges no wrongful withholding of funds, and no wrongful conduct for which the state is entitled to "compensation" for "damages sustained." Moreover, a Tucker Act claim must be for "actual, presently due money damages", United States v. King, 395 U.S. 1, 3 (1968), based on the past acts of the federal government. United States v. Mottaz, 476 U.S. 834, 106 S.Ct. 2224, 2234 (1986). A state's third party complaint cannot allege an entitlement to any actual, presently due amount, and cannot allege entitlement based on any past acts of the United States.

If the Tucker Act were broadly construed to divest district courts of jurisdiction over state third party complaints in Social Security litigation, there would be two major undesirable consequences. First, such a result would ensure bifurcation of cases, since the Claims Court could not exercise jurisdiction over the case

between beneficiaries and the state. The bifurcation would create inefficiency, confusion, and potential chaos at both the trial and appellate stages.

Second, such a result would shift much Social Security Act litigation to the Claims Court and Federal Circuit Court of Appeals. Neither court has expertise in Social Security Act litigation. There is no evidence of Congressional intent to shift such cases to these courts. It would be difficult for low income beneficiaries to regularly litigate in Washington. It would be inappropriate to shift the frequently controversial litigation brought by indigent claimants to a trial court lacking the protections of the Article III judiciary. If the Federal Circuit were made a de facto national court of appeals for Social Security Act litigation, there would be increased burdens on both that and this court.

Finally, the government has recently

made an even more expansive Tucker Act jurisdictional argument in the context of federal housing programs. The United States has suggested that an action for declaratory and injunctive relief arises under the Tucker Act when it has financial consequences, even when the plaintiffs do not seek money. Thomas v. Pierce, 662 F. Supp. 519 (D. Kan. 1987) appeal pending, No. 87-2121 (10th Cir. 1988). This argument, if accepted, could convert virtually any case in which program beneficiaries allege illegal conduct by the United States into a Tucker Act action. The Court should reject this major alteration of jurisdiction in the federal courts.

I. The Tucker Act does not divest a District Court from exercising jurisdiction over a state's third party complaint seeking federal financial participation for costs arising in an underlying action between beneficiaries and the state.

Apart from disallowance cases, there

is another major area of litigation concerning grant-in-aid programs under the Social Security Act. This other category arises when program beneficiaries sue a state for alleged violation of the Social Security Act. In such cases, the states often file a third party complaint against HHS, alleging that has been following the directives of HHS, and that if the state practice violates federal law, so do HHS' directives. Typically, the state seeks injunctive relief to prohibit HHS from sanctioning the state for compliance with court orders, and to require HHS to provide federal financial participation in the cost of compliance with the court's order.

Amici believe this category of cases is distinguishable from disallowance litigation. Even if this Court holds that the Claims Court has exclusive jurisdiction over disallowance cases, the Court could still make clear that state claims in third party complaint litigation do not arise

under the Tucker Act. Alternatively, the Court could reserve the issue for another day. However, amici fear that an expansive construction of the Tucker Act here could encourage lower courts to find the Tucker Act precludes district court jurisdiction over third party complaints in these cases.

However the Court decides this case, there are considerations in both Tucker Act jurisprudence and in the practical realities governing Social Security Act litigation that should lead to a holding that district court jurisdiction in these third party complaint cases is not limited by the Tucker Act.

In the following section, amici will describe the facts of Grimesy v. McMahon v. Bowen, an example of such third party complaint litigation. They will then explain both why this category is distinguishable from disallowance litigation, and why an expansive construction of the Tucker Act in the disallowance context could cause

severe damage in third party complaint litigation. The difficulties posed by applying an expansive view of Tucker Act jurisdiction in third party complaint litigation help to demonstrate some of the disturbing implications of HHS' arguments in this case.

A. Course of Events in
Grimesy v. McMahon v.
Bowen

The Grimesy litigation¹ began when AFDC Program beneficiaries sued California officials for injunctive relief and back benefits based on an illegal program practice.² J.A. at 23. Plaintiffs filed

¹ The following description is based on the pleadings and orders, as they appear in the Joint Appendix ("J.A.") on file in Federal Circuit No. 87-1228.

² AFDC is a cooperative federal state program of assistance to families with needy children, pursuant to Title IV-A of the Social Security Act, 42 U.S.C. §601 et seq.

The legal issue in Grimesy concerned counting of income in AFDC. California, when determining AFDC eligibility and benefits for families in which the parent was between the age of 18 and 19, "deemed (continued...)

suit in state court. The state removed the case to the United States District Court for the Northern District of California. J.A. at 18. Since the state engaged in its practice at the direction of the Secretary of Health and Human Services (HHS), the state filed a third party complaint against HHS. J.A. at 85-87. The third party complaint alleged that AFDC is a cooperative federal-state program and that the state is entitled to receive federal

²(...continued)
available" the income of the parents of the 18 year old parent, regardless of whether the parent was still in school. Plaintiffs contended that deeming of grandparent income when an eighteen year old parent was not in school or not expected to graduate by age nineteen violated both the Social Security Act, 42 U.S.C. §602(a)(39), and state law. The district court, and every court that addressed the issue concluded that the challenged practice violated federal law. See J.A. at 90-94; Kali v. Heckler, 800 F.2d 971 (9th Cir. 1986); Morrison v. Heckler, 602 F.Supp. 1482 (D.Minn. 1984), aff'd, 787 F.2d 1285 (8th Cir. 1986); Jiminez v. Cohen, No. 85-5285 (E.D. Pa. July 14, 1986); McCarthy v. Heintz, Civ. No. H-85-597 (MJB) (D. Conn. Apr. 23, 1986); Topps v. Bowen, No. 85-NC-0187W (N.D. Utah, Jan. 13, 1986).

financial participation (FFP) for expenditures made pursuant to an approved state plan. The state sought an order providing that if it were liable to plaintiffs, HHS be required to provide FFP for the AFDC program expenses incurred as a result of compliance with the court's order. J.A. at 87. HHS did not object to the district court's jurisdiction.

On June 25, 1986, the district court issued an order holding both the state's practice and the federal regulation on which the state practice was based violated the Social Security Act and were invalid. J.A. at 90-94. The court enjoined the state practice, and enjoined HHS from taking any action whatsoever against the state by way of compliance proceedings, audit disallowance or otherwise because of the state's compliance with the order. J.A. at 93. Both the state and HHS appealed to the United States Court of Appeals for the Ninth Circuit. (Ninth Cir.

Cases No. 86-2403, 86-2559). Each defendant subsequently dismissed their appeal, after the enactment of legislation which barred the practice plaintiffs challenged in the litigation.³

On July 23, 1986, the district court issued a subsequent order holding class members were entitled to corrective payments for the benefits lost while the state's unlawful practice was in effect. J.A. at 95-96.

On December 22, 1986, the district court entered an order implementing a procedure for provision of the corrective benefits. J.A. at 1-8. The order included a paragraph enjoining HHS from sanctioning the state for its compliance with the order or denying federal financial participation for the administrative and program costs

³ On October 22, 1986, Congress enacted the Tax Reform Act of 1986, P.L. 99-514. The Tax Reform Act amended 42 U.S.C. §602(a)(39) to prohibit any deemинг of grandparents' income when an eighteen year old parent seeks AFDC benefits.

incurred in complying with the order. J.A. at 8. The court also issued an order denying HHS' motion to reconsider its orders of June 25 and July 23. J.A. at 9-15.

HHS then filed notices of appeal in both the Federal and Ninth Circuits. It alleged that the part of the state's third party complaint seeking federal financial participation in the cost of retroactive benefits arose under the Tucker Act, and that therefore the state's claim should have been filed in the United States Claims Court. See Fed. Cir. Case No. 87-1228, HHS Substitute Br., at 1-2. HHS contends that the Federal Circuit has exclusive jurisdiction over the question, and that its Ninth Circuit appeal is only protective in nature. HHS Substitute Br., at i. The jurisdictional issues are currently pending before both courts.

To date, HHS has limited its argument to contending that the state's third party

complaint should have been heard in the Claims Court, and appealed to the Federal Circuit. However, HHS has not precluded the possibility of arguing that when a state's third party complaint arises in part under the Tucker Act, the Federal Circuit should exercise exclusive jurisdiction over the entire underlying litigation.⁴

⁴ HHS' Federal Circuit Brief in Grimesy contains this suggestive text:

"This Court has also held that exclusive appellate jurisdiction in the Federal Circuit lies over appeals including non-Tucker Act issues that would have been decided by the regional courts of appeals had they not appeared in the same case as a Tucker Act claim. It is beyond cavil that the plaintiffs' petition for relief from California, as contrasted with the California's third party complaint against the federal government, cannot be construed as coming within the scope of the Tucker Act. Nevertheless, this Court has stated that where the jurisdiction of the district court "was based, in whole or in part" (28 U.S.C. 1295(a)(2)) on a non-tax Tucker Act claim, the entire appeal is within the exclusive jurisdiction of the Federal Circuit, no matter what other claims have been joined with the Tucker Act claim in the complaint. Perhaps, although this Court need not consider that question today, this principle would extend so far

(continued...)

Disposition of Grimesy in the Federal Circuit has been stayed pending resolution of this case; HHS' corresponding request to the Ninth Circuit is pending. See Fed.Cir. Case No. 87-1228, Order, January 19, 1988.

B. A third party complaint seeking to enjoin denial of federal financial participation for costs not yet incurred does not meet the elements of a Tucker Act claim.

Whether or not a disallowance case arises under the Tucker Act, a third party complaint seeking to require the federal government to share in the costs of compliance with a court order is not a claim arising under the Tucker Act.

In United States v. Mitchell, 463 U.S. 206 (1983), this Court restated the test

⁴ (...continued)
as to bring within the jurisdiction of this Court non-Tucker Act claims raised by other parties in a multiple party cases, such as this one."

HHS Substitute Br., at 30, n.10 (citations omitted).

for determining whether claims founded on a federal statute are subject to Tucker Act jurisdiction:

The claim must be one for money damages against the United States, and the claimant must demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.'

463 U.S. at 216-17, quoting United States v. Testan, 424 U.S. 392, 400 (1976) (citations omitted).

A third party complaint seeking to require HHS to share in the cost of compliance with any court orders issued in an underlying action does not meet the Mitchell test. A complaint in such a case does not seek "compensation" and does not allege any right to "damages." It does not allege wrongful withholding of funds, or any wrongful conduct, by HHS. It is a contingent request that if the state is

held liable, the court order HHS to provide federal participation for all AFDC program expenses incurred as a result of compliance with the court's order.

In substance, such a complaint seeks declaratory relief. The state alleges no present injury, since there has been no determination of state liability, and no statement that HHS would refuse to provide federal participation for those costs. The state simply seeks a declaration of rights against HHS in case of state liability. The state does not seek "damages" within any ordinary meaning of the word.

Moreover, "damages for the [federal] Government's past acts" is "the essence of a Tucker Act claim for monetary relief." United States v. Mottaz, 476 U.S. 834, 106 S.Ct. 2224, 2234 (1986) (emphasis added). In the third party complaint, the state does not sue HHS for losses previously incurred by the state. The claim is made before any determination that the state is

liable to program beneficiaries. The claim is entirely contingent: that if the court holds the state liable to program beneficiaries, the court should require HHS to provide federal financial participation for the resulting costs.

Further, under United States v. King, 395 U.S. 1, 3 (1968), a Tucker Act claim must be for "actual, presently due money damages." A state's third-party complaint can allege no certain sum. This is not a matter of artful pleading. No amount is "actually, presently due" from HHS. The district court's final order cannot specify an actual, presently due amount, because the court cannot adjudicate an amount. Typically, the state will not know the amount of its claim for federal financial participation until class members complete a claiming process. This may be months or years after completion of proceedings on the merits of the case. The court can only resolve the principle of entitlement to

federal financial participation. This is far from the "actual, presently due" standard of King.

The fact that a declaration of a state's right to federal financial participation may eventually lead to the payment of money is not enough to make it a claim for money damages. "A district court does not lose jurisdiction over a claim for non-monetary relief simply because it may later be the basis for a money judgment." Laguna Hermosa Corp. v. Martin, 643 F.2d 1376, 1379 (9th Cir. 1981) (action seeking declaration of contract rights against United States not a Tucker Act action); Rowe v. United States, 633 F.2d 799 (9th Cir. 1980), cert. denied, 451 U.S. 970 (1981) (action to compel award of oil and gas leases not a Tucker Act claim).

To date, HHS has limited its claim to asserting that the portion of the third party complaint seeking federal participation in the cost of back benefits arises

under the Tucker Act. However, it seems impossible to draw a viable distinction between the claims for participation in prospective relief and back benefits. In both situations, the claim has fiscal consequences, but does not meet any traditional notion of money damages.

We are aware of no case in which an action seeking to direct the government to pay an unspecified amount at an unspecified time in the future for expenses not yet incurred was held to arise under the Tucker Act. In this sense, the third party complaint is distinguishable from a disallowance case, where a state seeks to recover a sum certain based on a specific past act of HHS. However this Court resolves the disallowance issue in the pending case, the Court's opinion should make clear that the Tucker Act does not extend to the circumstance of a state's third party complaint against HHS in beneficiary/state litigation.

C. A finding that the Tucker Act divests a district court of jurisdiction in the Social Security Act third party complaint litigation would cause severe problems of judicial and program administration.

There are strong policy reasons to resolve any uncertainty against finding that the Tucker Act divests district courts from jurisdiction in Social Security Act third party complaint litigation. To the extent that a finding that the district court is without jurisdiction in the disallowance context could lead to a comparable result in the third party complaint context, these policy reasons should militate against finding the district court divested from jurisdiction in the case before the court.

Initially, it is important to recognize that the real dispute is not about whether issues concerning Social Security Act program administration are subject to judicial review; it is about where review

should take place. If the position of the states and program beneficiaries is adopted, a district court can hear the state's third party complaint along with the primary case between beneficiaries and the state, and all issues can be appealed to the appropriate regional circuit. If HHS is correct, the state's third party complaint must go to the Claims Court, with exclusive appellate jurisdiction in the Federal Circuit Court of Appeals. 28 U.S.C. §1295(a)(3).

Adoption of HHS' position would have two undesirable policy impacts: it would lead to fragmented litigation in multiple forums, and it would shift many of the most fundamental issues regarding beneficiary rights and operation of federal grant-in-aid programs from district courts and regional courts of appeals to the Claims Court and the Federal Circuit Court of Appeals. These effects become apparent by considering the impact of a finding that

the Claims Court has exclusive jurisdiction over part or all of a state's third-party complaint.

i. HHS' Position would result in multiple forums and duplicative litigation.

HHS' position would result in duplicative litigation in multiple forums whenever program beneficiaries seek prospective and retroactive relief, and the state files a third party complaint against HHS.

If a court accepted HHS' position that a state claim for FFP for back benefits must be heard in the Claims Court, there would be two possible procedural results. Either the third party complaint would be bifurcated and the back benefits part sent to the Claims Court, or the entire third party complaint sent to the Claims Court. As all parties seem to recognize, bifurcation is undesirable because it results in duplication, confusion, and difficult issues of collateral estoppel. However, even if the entire third party complaint is

sent to the Claims Court, there will still be an unresolvable bifurcation problem.

First, consider the effects of bifurcating the third party complaint. Since issues concerning back benefits are usually substantially identical to those concerning prospective relief,⁵ bifurcation at the district court/Claims Court level would merely waste resources. Either one court would consider itself bound by the decision of the other, or each court would consider itself free to consider the merits of the underlying dispute without regard for the other. In either case, no policy would be served by this duplicative litigation.

Even if one court deferred to the other at the trial court level, what would happen on appeal? Conceivably, there could

⁵ Grimesy is atypical in one respect: HHS raised independent defenses to whether it must join in the cost of paying back benefits while no longer defending on the merits of the case. Usually, the legal issues that determine entitlement to prospective relief also determine entitlement to back benefits.

be appeals from either beneficiaries or the state in the primary case; those appeals would go to the regional court of appeals. There could also be appeals from either HHS or the state concerning the third party complaint. Would appeals concerning prospective relief go to the regional circuit and appeals concerning retroactive relief go to the Federal Circuit? If so, how would the two courts of appeal be expected to administer simultaneous appeals on overlapping issues involving the same case? The possibilities for conflict are apparent.

The Grimesy litigation demonstrates that these concerns are real. In Grimesy, HHS initially appealed the order for prospective relief to the Ninth Circuit. It only dismissed the appeal after it concluded that congressional legislation made its appeal moot. Six months after appealing the prospective order to the Ninth Circuit, HHS appealed the order

concerning retroactive benefits to the Federal Circuit.⁶ If the first appeal were still pending, would HHS expect both appeals to proceed simultaneously? If the legality of HHS' regulation was relevant to both prospective and retroactive relief, could both appellate courts decide it? Should one court defer to the other? Moreover, what if the beneficiaries had objected to some part of the order for retroactive relief, and also appealed? What if the state appealed either the order for prospective relief, or retroactive relief, or both? Both appellate courts would be asked to resolve identical issues with overlapping parties in components of the same case at the same time. The possibilities for chaos are tremendous under HHS' construction.

The alternative to bifurcating the

⁶ HHS also appealed this order to the Ninth Circuit, but (subsequently) designated this appeal as a "protective" appeal.

state's third party complaint would be for the Claims Court to exercise pendent jurisdiction over the entire third party complaint. But this would not resolve the procedural morass.

Necessarily, the third party complaint would be bifurcated from the beneficiaries' action against the state, because the Claims Court could not exercise pendent party jurisdiction over the beneficiaries' action. See Uram v. United States, 216 Ct. Cl. 418, 420 (1978) (Court of Claims cannot render judgment against third party unless that party makes claim for money against U.S. or U.S. makes claim for money against third party).

Assuming the third party complaint was bifurcated, which action would proceed first? Logically, the beneficiaries' action should proceed, since the state's third party complaint is wholly contingent. But the state would undoubtedly contend that it is merely following the directions

of the federal government, and that the real dispute is between beneficiaries and HHS. Since HHS is no longer a party in the district court, and beneficiaries cannot be parties in the Claims Court, there is no forum for resolution of their dispute.

Whichever case proceeded first, there would still be the problem of appellate sequence and duplication. Would there be simultaneous appeals in the regional and Federal Circuit? Should one defer to the other? The only alternatives would be for one appellate court to rubber-stamp the other's decision, or risk conflicting decisions by two appellate courts in the same case.⁷

⁷ Under some circumstances, there might even be three appellate courts involved in the same case. In the Grimesy litigation, plaintiffs initially filed their complaint for prospective relief and back benefits in state court, and the state removed the action to federal court. The state agreed to waive the Eleventh Amendment, so that the federal court could issue any back benefit award. Had the state not done so, the federal court would have lacked jurisdiction over the back benefit (continued...)

These convoluted procedural difficulties are not hypothetical. Grimesy illustrates how they can and will occur if the state third party complaint is held to be, in whole or in part, beyond the jurisdiction of the district court.

ii. HHS' Position would have the effect of creating a national trial court and a National Court of Appeals for Social Security Act litigation.

HHS' position is also undesirable because it would have the effect of centralizing much Social Security Act litigation in the Claims Court and Federal Circuit Court of Appeals. If the basic issues concerning operation of grant-in-aid programs are all centralized in the Claims

⁷(...continued)
claim, Edelman v. Jordan, 415 U.S. 651 (1974), and would have had to remand that claim to state court. At that point, the case could have generated decisions on closely related issues by the state appellate court, regional circuit court of appeals, and Federal Circuit Court of Appeals.

Court and Federal Circuit, the federal judicial structure will be seriously disrupted.

First, neither the Claims Court nor the Federal Circuit Court of Appeals purport to have expertise in issues concerning the grant-in-aid programs under the Social Security Act. In contrast, the district courts and regional courts of appeals have decades of experience in considering such issues.

Second, there is no evidence that Congress, in enacting the Federal Courts Improvement Act of 1982, P. L. No. 97-164, 96 Stat. 25, suggested any expectation that the Claims Court and the Federal Circuit Court of Appeals would now become the primary forums for resolution of issues under the Social Security Act grant-in-aid programs. Indeed, there is not even a reference to such a possibility in the

legislation or its history.⁸

Third, the beneficiaries of Social Security Act programs are typically the poorest members of our society. They would be the most disadvantaged if they were routinely compelled to litigate appellate claims in Washington, D.C. When low income people can obtain representation in civil matters, the representation is typically from legal services organizations with very limited budgets. If significant numbers of the cases necessitate the expense of

8 It appears that all of the cases considering the applicability of the Tucker Act to the Social Security Act grant-in-aid programs have arisen after the enactment of the Federal Courts Improvement Act of 1982. See, e.g., Commonwealth of Massachusetts v. Departmental Grant Appeals Board, 815 F.2d 778 (1st Cir. 1987); Maryland Dept. of Human Resources v. Dept. of Health and Human Services, 763 F.2d 1441 (D.C. Cir. 1985); State of Minnesota by Noot v. Heckler, 718 F.2d 852 (8th Cir. 1983). If the United States had envisioned that the Claims Court and Federal Circuit would become major forums for Social Security Act litigation, it is hard to understand why the suggestion was never made to Congress while the FCIA was under consideration.

litigating in Washington, the cost will necessarily reduce resources available for representation in other cases. The original rationale for allowing concurrent district court jurisdiction over Tucker Act claims not exceeding \$10,000 was so that litigants with small claims not be forced to expend the resources of litigating in Washington, D.C. It is fundamentally inconsistent with that goal to shift Social Security Act litigation away from local courts to centralized adjudication in Washington.

Fourth, the Claims Court is not only an inconvenient forum for indigent plaintiffs; it also lacks the protections of an Article III court. Its members do not have life tenure, and depend on executive renomination and Congressional reapproval to maintain their positions. This makes it a particularly inappropriate forum for low income persons, who must often bring politically controversial suits seeking to

protect or establish their rights.

Finally, there may be some areas of law where the advantages of resolution in a single forum outweigh the advantages of presenting the issues to various district and appellate courts, but Social Security Act litigation is not such an area. Numerous issues regularly arise under the Act regarding eligibility, benefits, financial determinations, and local administrative practices. Under our federal appellate structure up to now, it has been possible for these issues to be litigated in various forums, so that this Court need only address the issues where conflicts arise in the circuits, or the issues are of exceptional importance. If these cases are centralized in the Claims Court and Federal Circuit, then there will be no opportunity for the winnowing process that normally occurs as issues are heard by a number of courts. Instead, this Court will be forced to either intervene after initial decisions

by a single appellate court, or to leave in the hands of that single court fundamental decisions on areas of crucial concern to low income citizens who rely on the Social Security Act programs.

II. An expansive construction of the Tucker Act raises troublesome implications in other areas of law affecting federal program beneficiaries.

A. Federal Housing Programs

The federal government's contention that any claim that may result in money damages belongs in the Claims Court is not limited to the Social Security Act disallowance context. The government has also raised the Tucker Act issue in cases involving claims by program beneficiaries under the nation's housing laws.⁹ It is

⁹ See Thomas v. Pierce, 662 F. Supp. 519 (D. Kan. 1987), appeal pending, Case No. 87-2121 (10th Cir.); Mann v. Pierce, 803 F.2d 1552 (11th Cir. 1986); Conille v. Pierce, 649 F. Supp. 1133 (D. Mass. 1986), aff'd, No. 87-1120 (1st Cir., Feb. 19, 1988); Committee for Fairness, et al., v. Pierce, C.A. No. 87-0324 JHP (D.D.C.); (continued...)

appropriate for the Court to be aware of both the sweeping nature of the government's efforts to redefine the federal judicial scheme, and of the dramatic impact such alteration would have on the right of program beneficiaries⁹ to seek redress for grievances historically entertained by the district courts.

Housing cases are often brought in federal district court by tenants or homeowners seeking judicial review of a U.S. Department of Housing and Urban Development (HUD) or Farmers Home Administration (FmHA) decision which has adversely impacted on their right to receive specified housing benefits under the federal housing statutory scheme.¹⁰ While the litigation may result in the expendi-

⁹(...continued)
Council of Large Public Housing Authorities v. HUD, C.A. No. 82-1210 NHJ (D.D.C.).

¹⁰ See cases cited in n.9, supra, and n.12, infra.

ture of monies by HUD or FmHA, this result is secondary to the primary goal of establishing the federal agency's duty to act in a specified manner. Thus, the immediate and prerequisite relief sought is declaratory or injunctive relief.

Nevertheless, as demonstrated below, the federal government's position has been that the plaintiffs must pursue such claims in the Claims Court because the claim will have financial consequences, and that no other independent source of waiver of sovereign immunity exists or is applicable. The following case is illustrative.

In Thomas v. Pierce, 662 F. Supp. 519 (D. Kan. 1987) appeal pending, No. 87-2121 (10th Cir. 1988), low-income tenants sought judicial review of HUD's actions in selling a low-income housing project with only partial subsidy, effectively removing two-thirds of the units from lower-income

use.¹¹ As in numerous similar cases heard by federal district courts since 1975,¹² plaintiffs sought judicial review pursuant to the Administrative Procedure Act (APA)

11 In 1978 Congress enacted legislation establishing standards governing the disposition of HUD-owned multi-family properties. See Housing and Community Development Amendments of 1978, 12 U.S.C. §1701z-11. HUD implemented regulations requiring, inter alia, that formerly subsidized projects, such as the one in Thomas, be sold in a manner to ensure their preservation as decent and affordable housing. 24 C.F.R. §§290.25(b), §290.27(b) (1987).

12 Both before and after passage of the Housing and Community Development Amendments of 1978, HUD's property disposition decisions have been challenged in court, with cases brought before the 1978 legislation claiming that HUD had not complied with the National Housing Act or national housing goals. See Russell v. Landrieu, 621 F.2d 1037 (9th. Cir. 1980); Tenants for Justice v. Hill, 413 F.Supp. 389 (E.D. Pa. 1975). After Congress codified and expanded these judicial holdings in 1978, HUD's actions continued to be challenged. See Frisby v. HUD, 755 F.2d 1052 (3d Cir. 1985); Paris v. HUD, 713 F.2d 1341 (7th Cir. 1983), subsequent decision sub nom Cowherd v. HUD, 827 F.2d 40 (7th Cir. 1987). Until Thomas, the federal government had not taken the position that the Tucker Act provided exclusive jurisdiction to the Claims Court for claims under the property disposition provisions of the Act.

(5 U.S.C. § 706). Plaintiffs requested declaratory and injunctive relief to require HUD to comply with the statute and regulations, and require HUD to repurchase the project and reprocess it with the required rental subsidies.¹³

In Thomas, the District Court dismissed the case, accepting the federal government's contention that neither 5 U.S.C. §702 of the APA nor 12 U.S.C. §1702 or 42 U.S.C. §1404 of the housing statutes waived HUD's sovereign immunity. Plaintiffs appealed to the Tenth Circuit, where the federal government for the first time contends that the APA waiver is also unavailable because under the Tucker Act, the Claims Court is available for plaintiffs' claim.¹⁴ If the government's

¹³ Plaintiffs in Thomas have also relied on the waiver of sovereign immunity provided in 12 U.S.C. §1702 and 42 U.S.C. §1404a of the Housing Acts for HUD's actions with respect to the Section 8 program.

¹⁴ HUD's brief in Thomas, filed in the Tenth Circuit on January 14, 1988, states,
(continued...)

position prevails in Thomas, plaintiffs will be forced to litigate their claim for declaratory and injunctive relief in the Claims Court, with any appeal being heard in the Federal Circuit. Such a result

14 (...continued)
at p.25:

From an objective analysis of what the suit will require the sovereign to do, the relief sought is akin to money damages. It will require that HUD obtain (from somewhere) extensive additional money to pay for 88 more Section 8 units over fifteen years. Needless to say, from the sovereign's perspective, this appears to be relief in the form of money damages for which it has not consented to be sued in this forum.²

In footnote 2 on page 25, HUD elaborates:

Under the Tucker Act, 28 U.S.C. §1491, the United States has consented to suit with respect to certain claims for money damages. . . . The Court of Claims is further empowered under the 1972 amendments to 28 U.S.C. §1491 to award limited equitable relief in order to 'provide an entire remedy and to complete the relief afforded by the judgment . . .' Thus, the Court of Claims could afford appellants the relief sought. (Emphasis added.)

would run contrary to the accepted and well-established practice of bringing such entitlement or grant-in-aid lawsuits in the district courts.¹⁵

Thomas represents one step beyond the position being espoused by HHS in its brief in this case. Here, HHS asserts that a claim for prospective relief should be heard in the Claims Court when it is joined with an action challenging a disallowance, because the disallowance action seeks the payment of money. In Thomas, the United States asserts that a claim for declaratory and injunctive relief must be heard in the Claims Court if the relief sought has financial consequences for the government, even though plaintiffs do not seek money from the United States. This view of "money damages" would mean that virtually any case in which program beneficiaries seek injunctive relief to correct wrongful conduct by the United States would be held

¹⁵ See n.12, supra.

to belong in the Claims Court.

The Thomas position is wholly inconsistent with Congressional intent. There is no evidence of Congressional intent to shift jurisdiction for cases brought by program beneficiaries involving entitlement or grant-in-aid programs to the Claims Court. Indeed, the history of housing program beneficiary litigation demonstrates that until recently, it was accepted practice that such cases could properly be brought in the district courts by a waiver of sovereign immunity provided by either the APA or housing acts. Yet, the government would have the Court turn the APA on its head by depriving district courts of jurisdiction in cases where there is a prospect of monetary expenditures as a result of complying with the court's declaratory or injunctive relief.

Moreover, a review of the litigation arising under federal housing laws demonstrates that the federal government seeks

to deprive district courts of jurisdiction over any housing case where there will be financial consequences of complying with judicially imposed declaratory or injunctive relief, regardless of the source of authority relied upon by plaintiffs for waiver of sovereign immunity.¹⁶

¹⁶ Despite the government's acknowledgement on page 38, n.32 of their brief that there are statutes in which Congress has provided a separate waiver of sovereign immunity to pursue monetary claims, the government has refused to recognize that the waivers contained in 12 U.S.C. §1702 or 42 U.S.C. §1404 of the Housing Acts as sufficient to afford district court jurisdiction over housing cases with monetary consequences. See, e.g., Johnson v. Secretary of HUD, 710 F.2d 1130 (5th Cir. 1983); Merrill Tenant Council v. HUD, 638 F.2d 1086, 1090 (7th Cir. 1981); Trans-Bay Engineers and Builders, Inc. v. Hills, 551 F.2d 370 (D.C. Cir. 1976). Propelled by decisions such as Amoco Prod. Co. v. Kodel, 815 F.2d 352 (5th Cir. 1987), cert. petition pending; New Mexico v. Regan, 745 F.2d 1318 (10th Cir. 1984), cert. denied, 471 U.S. 1065 (1985); and Portsmouth Redevelopment & Housing Authority v. Pierce, 706 F.2d 471 (4th Cir.), cert. denied, 464 U.S. 960 (1983); and as demonstrated in Thomas, supra, the government apparently intends to pursue its position in every housing case where the possibility of monetary consequences exists. This policy is consistent with the government's contention in this case that the "exclusive jurisdiction of (continued...)

B. Other Federal Programs

Program beneficiaries of a myriad of federal entitlement and grant-in-aid programs seek enforcement of rights and benefits under such programs by challenging conduct of federal agencies in the federal district courts. In programs ranging from food stamps, education, social security, school lunches, to health and welfare benefits, the federal reporters are filled with judicial decisions construing the rights of beneficiaries under such programs in cases heard by the district courts and regional courts of appeals.

The government's position, as it emerges from this case, Grimesy, and Thomas, would fundamentally alter the practice of having such actions heard in district courts, with appeals to the

16 (...continued)
the Claims Court extends to any case that includes a Tucker Act claim." (Brief of Petitioners/Cross Respondents at p. 41, n.35.)

regional courts of appeals. Virtually any case that was not purely prospective in nature would risk being shifted to the Claims Court and Federal Circuit. Program beneficiaries would be forced to abandon claims seeking correction of wrongful government conduct if they wished to have actions for prospective relief heard in the district courts. This would flow from the fact that virtually every case brought by program beneficiaries seeking declaratory, injunctive or mandatory relief to correct wrongful agency action necessarily has a direct or indirect financial consequence.

While artful pleading should not be permitted to distort a suit for money damages into an equitable action, the converse is equally true: the government should not be permitted to distort suits for equitable relief into ones for money damages.¹⁷ Typically, program benefi-

¹⁷ See Brief of the Petitioners/Cross Respondents, at p. 22.

ciaries seeking judicial review of alleged agency misconduct sue for injunctive and declaratory relief, not only in form but in reality. They seek judicial review of a policy, regulation or practice which impinges on the ability of the aggrieved beneficiary to obtain statutory entitlements. The relief they seek cannot be provided by the Claims Court. For example, the Claims Court cannot require a federal agency to use Notice-and-Comment rulemaking. It cannot enjoin an agency from arbitrary and capricious action, or require an agency to follow a certain procedure. The Claims Court cannot prohibit an agency from making future decisions. The only thing the Claims Court can do is to order an agency to pay money and any relief necessary to accomplish that act. It can do nothing about preventing an agency from repeating the offending conduct in the future. This kind of relief is available only in the district court.

If this Court were to accept the government's broad view of "money damages", and its broad view of the jurisdictional implications of a claim for "money damages" against the United States, the district courts would be divested from jurisdiction over cases involving government benefits of any type, whenever beneficiaries sought to correct wrongful agency conduct. Such a result would not further Congressional intent, would not lead to a reasonable allocation of responsibilities in the federal court system, and would impair the abilities of federal program beneficiaries to seek relief for wrongful government conduct.

CONCLUSION

This Court should hold that the Tucker Act does not divest a district court from exercising jurisdiction over a disallowance action. If the Court concludes that a disallowance action arises under the Tucker Act, it should make clear that the decision

does not determine the related but distinct issue of Tucker Act jurisdiction for a state's third party complaint seeking to require federal financial participation in an underlying action between beneficiaries and a state.

Respectfully submitted,

March 29, 1988

TAMARA DAHN
GILL DEFORD
MARK GREENBERG
CHARLES GREENFIELD
JANE PERKINS
PETER REID
MANUEL ROMERO
RICHARD ROTHSCHILD*
RODGER SCHWARTZ

*Attorney of Record